Supreme Court, U.S.
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No. 90-1643

IN THE
Supreme Court of the United States

October Term, 1990

KEHR PACKAGES, INC.
JAMES MCMURTRIE,
CHARLES MCMURTRIE AND EMILY MCMURTRIE,
Petitioners,

v.

FIDELCOR, INC.,
FIDELITY BANK, NATIONAL ASSOCIATION,
THOMAS DONNELLY, JAMES NOON,
NEIL COHEN AND MARIO GIANINNI,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Third Circuit's holding that Fidelity Bank could not be both a "person" engaged in racketeering activity and an "enterprise", where the enterprise is alleged to be comprised of an "association in fact" of Fidelity Bank, its commercial loan and asset recovery departments, and its parent and bank holding companies, is consistent with the decisions of other Courts of Appeals?

2. Whether the Third Circuit's focus on factors other than the duration of the predicate acts to determine whether the "pattern" requirement of the RICO statute has been met, is consistent with this Court's holding in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989)?

PARTIES TO THE PROCEEDING

The caption of this case in the Court of Appeals for the Third Circuit is

Kehr Packages, Inc., James McMurtrie,
Charles McMurtrie and Emily McMurtrie

v.

Fidelcor, Inc., Fidelity Bank, National Association
Thomas Donnelly, James Noon,
Neil Cohen and Mario Gianinni

Fidelity Bank, National Association is a wholly owned subsidiary of Fidelcor, Inc. Fidelcor, Inc. is a wholly owned subsidiary of First Fidelity Bancorporation.

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STATUTORY PROVISIONS

In addition to those provisions of the Racketeering Influenced and Corrupt Organizations Act set forth by the petitioners, the following statutory provisions are applicable to the instant petition.

Title 18, United States Code, Section 1962(c) provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Title 18, United States Code, Section 1962(d) provides:

> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

This petition involves an action brought under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* ("RICO"). The action was commenced on August 24, 1989, by Kehr Packages, Inc. ("Kehr Packages"), James and Charles McMurtrie, individuals who purchased all of the stock of Kehr Packages in a leveraged buyout in December, 1986, and Charles McMurtrie's wife, Emily McMurtrie, the Petitioners herein. The Petitioners charge a violation of RICO and an assortment of state law claims against Fidelcor, Inc. (the "Parent Company"), its subsidiary Fidelity Bank, National Association ("Fidelity"), James Noon and Neil Cohen, two former loan officers of Fidelity who were involved in the making of a loan to Kehr Packages (the "Loan Officers"), Thomas Donnelly, a Vice President of Fidelity who works in the asset recovery group of Fidelity and who took over the responsibility of monitoring the loan to Kehr Packages after the Loan Officers left Fidelity, and Mario Gianinni, a former associate counsel of Fidelity, the Respondents herein.

Petitioners' RICO claim is grounded upon predicate acts of mail fraud. Specifically, Petitioners allege that the Loan Officers engaged in a scheme to defraud them by luring them to close on a $4,165,000.00 loan made by Fidelity to Kehr Packages with the oral promise that an additional loan in the amount of $185,000.00 would be made to Kehr Packages. (A54). Petitioners allege that Donnelly thereafter made false representations and omissions to them in order to lull them into a false sense of believing that the additional financing promised by the Loan Officers would be forthcoming. (A55, 56). Respondents are alleged to have used the United States mails to send statements setting forth the amount of principal and interest due on the loans from Fidelity to Kehr Packages (A54), and to notify Petitioners that the loans were in default (A56), in furtherance of a scheme to defraud Petitioners.

On January 29, 1990, Respondents moved to dismiss this case. Petitioners filed a response to Respondents' motion to dismiss, together with a motion for leave to file an amended complaint in order to more particularly set forth their RICO and pendent state law claims. Petitioners attached to their motion their proposed amended complaint. The amendment expanded their original one count RICO claim into four separate counts alleging violations of §1962(a) through (d), respectively. (A58-62). The amended complaint dropped the Parent Company and Mario Gianinni as defendants. (A48).

On May 14, 1990, the United States District Court for the Eastern District of Pennsylvania granted Respondents' motion, holding that Petitioners failed to plead facts sufficient to satisfy the "pattern" requirement of RICO. (A42, 47). The District Court denied Petitioners' motion for leave to file their amended complaint because it did not establish a valid RICO claim and failed to cure the deficiencies contained in their original complaint. (A42).

On appeal, the United States Court of Appeals for the Third Circuit affirmed the District Court's dismissal of the case and the denial of Petitioners' motion for leave to file the amended complaint. (A30). *Kehr Packages, Inc., et al. v.*

Fidelcor, Inc., et al., 926 F.2d 1406 (3d Cir. 1991). The Third Circuit rejected Petitioners' claim under §1962(a) because the alleged fraudulent activity was not linked to the use or investment of income in any enterprise. (A10). Petitioners' §1962(b) claim was also dismissed because the proposed amended complaint failed to allege a specific nexus between the control of a named enterprise and the alleged racketeering activity. (A10).[1]

The Third Circuit found that the alleged violation of §1962(c) was deficient on two grounds. First, Petitioners improperly named Fidelity both as the "enterprise" and the "person" engaged in racketeering activity under §1962(c). Because Fidelity could not be a RICO defendant, the Court held that Fidelity cannot be liable under a respondeat superior theory for RICO violations committed by its employees. (A11).

Second, Petitioners did not satisfy the statute's requirement that a "pattern of racketeering activity" be alleged. To reach this result, the Third Circuit focused separately on the alleged deceptive acts of Donnelly and the Loan Officers. It concluded that Donnelly's conduct did not constitute mail fraud and added nothing to the alleged scheme to defraud the Petitioners. (A25). As against the Loan Officers, the Third Circuit held that the amended complaint failed to allege that they engaged in a "pattern of racketeering activity" because it did not contain facts showing long-term criminal activity or a threat of future criminal activity on their part.[2] (A28, A29).

One of the judges on the panel concurred with the dismissal of Petitioners' claims under §1962(a) and (b), but dissented on the dismissal of the claims under §1962(c) and (d).

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1. Petitioners do not challenge the dismissal of their §1962(a) and §1962(b) claims. They seek only the reinstatement of the portions of the amended complaint which purport to allege violations of §1962(c) and §1962(d), respectively.

2. Having found that Petitioners did not state a claim under §1962(c), the Third Circuit did not consider whether Petitioners' claim under §1962(d) was properly alleged. (A11).

(A30). Although he agreed that the amended complaint did not allege facts showing a threat of future racketeering activity (A34), he disagreed with the majority that the focus is on anything other than the duration of the alleged racketeering activity and its examination of Donnelly's conduct in isolation from that of the other Respondents. (A40).

Petitioners sought and were denied a rehearing en banc. (A41). This petition followed.

SUMMARY OF THE ARGUMENT

The Third Circuit's holding that Fidelity cannot occupy a dual role of a "person" and an "enterprise" under §1962(c) is consistent with the holdings of other Courts of Appeals. The allegation that Fidelity is "associated in fact" with other legal entities and departments within Fidelity does not satisfy the "enterprise" element of §1962(c). The amended complaint fails to establish that the enterprise is an ongoing, continuous organization that has an ascertainable structure distinct from the alleged racketeering activity.

The Third Circuit's application of the RICO pattern requirement to the alleged acts of Donnelly independent of the alleged criminal acts of the Loan Officers is consistent with the guidelines enumerated by this Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). The existence of a "pattern of racketeering activity"—depends upon the circumstances of each case and requires something more than the number and duration of the predicate acts. The predicate acts must be related and amount to or pose a threat of continued criminal activity. When the claim is based upon mail fraud, the multiplicity of otherwise "innocent" mailings does not necessarily transform the underlying fraudulent acts into a pattern of racketeering activity. An examination of the underlying fraudulent conduct is necessary to determine whether the alleged acts form a "pattern of racketeering activity" and fall within the purview of the RICO statute.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. Introduction

In their amended complaint, Petitioners allege that the Respondent Loan Officers engaged in a scheme to defraud them by inducing them to complete the closing of a $4,165,000.00 loan made by Fidelity to Kehr Packages in December of 1986 by orally promising that an additional loan of $185,000.00 would be made to Kehr Packages for working capital (the "Kehr Packages Scheme"). (A54). The Loan Officers left Fidelity in mid-1987 and the responsibility for monitoring the loan was ultimately given to Donnelly. (A54). The amended complaint does not allege that Donnelly promised Petitioners anything or participated in any fraud other than the Kehr Packages Scheme. Rather, Petitioners allege that from July of 1987 through December of 1988, Donnelly lulled them "into a false sense of security in believing that [Fidelity] would fund additional working capital" to Kehr Packages by: (1) telling them that he would review the loan file to determine whether additional funds could be advanced to Kehr Packages; (2) having a liquidation value appraisal done on the machinery and equipment of Kehr Packages; (3) asking Petitioner James McMurtrie for a "plan of attack" to show him how Kehr Packages could be turned around financially and make a profit; (4) failing to tell Petitioners that he worked in the asset recovery group of Fidelity; and (5) disclosing to a buyer interested in the stock of Kehr Packages that the loan made to Kehr Packages by Fidelity was in default. (A54, 55).

The mailing of monthly invoices from Fidelity to Kehr Packages setting forth the amounts of principal and interest due on the loans that were made to Kehr Packages, checks from Kehr Packages to Fidelity for loan payments, and Donnelly's letters to Petitioners, notifying them that the loans were in default, are alleged to have furthered the Kehr Packages Scheme. (A54, 56). The instant petition concerns the sufficiency of Petitioners' claim under §1962(c) of RICO based upon these allegations.

Section 1962(c) of the RICO statute makes it unlawful "for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. §1962(c). In order to state a claim for a violation of §1962(c), a RICO plaintiff must allege (1) the existence of an enterprise; (2) that persons associated with or participated in the conduct of the enterprise's affairs; (3) through a pattern; (4) of racketeering activity. *Sedima, S.P.R.L. v. IMREX Co., Inc.*, 473 U.S. 479, 489 (1985).

Each of these elements is defined in the statute. A "person" is "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. §1961(3). The term "enterprise" is defined as including "any individual, partnership, corporation or association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. §1961(4). A "pattern of racketeering activity" requires at least two predicate acts of racketeering activity.[3] 18 U.S.C. §1961(5).

The RICO statute does not define the word "pattern". In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), this Supreme Court held that the "pattern" requirement is satisfied if the predicate acts of racketeering activity are "related" and "amount to, or that they otherwise pose a threat of, continuing racketeering activity," the latter being described as a requirement of "continuity." *H.J. Inc.*, 492 U.S. at 240.

In this case, the Third Circuit reviewed the validity of Petitioners' §1962(c) claims as against each of the Respondents. It found that the amended complaint improperly named Fidelity as both the "enterprise" and a "person" associated with or participating in the affairs of the enterprise through a

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3. Under §1961(1), "racketeering activity" can mean any of the state law or federal offenses enumerated in this section, including mail fraud under 18 U.S.C. §1341. Petitioners' RICO claim is based upon the predicate acts of mail fraud under §1341.

pattern of racketeering activity, and dismissed the §1962(c) claim against Fidelity. (A10, 11). The Third Circuit's holding is consistent with the holdings of other Courts of Appeals.

As against Donnelly, the Third Circuit concluded that the alleged predicate acts did not fall under the purview of the mail fraud statute and, for the purposes of establishing the element of a "pattern of racketeering activity" under RICO, added nothing to the alleged Kehr Packages Scheme or the alleged racketeering activity of the Loan Officers. (A25).

The Third Circuit found that the alleged misrepresentations made by the Loan Officers occurred over a short period of time, were targeted only at Kehr Packages, and showed no threat of further criminal activity. (A25). The Court held that these allegations failed to establish a "pattern of racketeering activity" under RICO. The Court's dismissal of Petitioners' §1962(c) claim against both Donnelly and the Loan Officers is consistent with the principles enumerated by the Supreme Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

2. The Third Circuit's holding that Fidelity cannot be both a "person" and an "enterprise" under 18 U.S.C. §1962(c) is consistent with the decisions of other Courts of Appeals.

Petitioners describe the RICO "enterprise" in paragraph 61 of the amended complaint as follows:

> Fidelity Bank, and the parent holding companies, Fidelcor, Inc. and First Fidelity Bancorporation, and the Commercial Loan Department and Asset Recovery Group, together were all associated in fact and formed an enterprise as defined in 18 U.S.C. Section 1961(4). (A58).

The Third Circuit held that Fidelity cannot be named as both the "person" and the "enterprise". Petitioners claim that a conflict exists among the Courts of Appeals as to the components of an "enterprise", and they ask this Court to

resolve this conflict. The conflict perceived by Petitioners, however, simply does not exist.

The circuit courts do not differ on the components of a RICO "enterprise." In each of the cases cited by the Petitioners, the Courts applied the principles set forth by this Supreme Court in *United States v. Turkette*, 452 U.S. 576 (1981) that an "enterprise" must be an ongoing organization that is separate and distinct from the pattern of racketeering activity. The difference in the make-up of the enterprises in those cases before the Courts of Appeals arises from the facts of each case, and nothing more. Indeed, not every RICO enterprise will be comprised of a single entity or a group of individuals.

In *United States v. Turkette*, this Court addressed the issue of whether a group of individuals who formed an association for the purpose of engaging only in illegal activity constituted an "enterprise" under RICO. The Supreme Court held that a RICO "enterprise" reaches both legitimate and illegitimate enterprises. In reaching this conclusion, the Supreme Court stated that §1961(4) of RICO describes two separate categories of associations that fall under the definition of an "enterprise." The first category is those organizations that are legal entities such as corporations and partnerships. The second category encompasses groups or unions associated in fact that are not legal entities. *Turkette*, 452 U.S. at 582.

The "enterprise" alleged in that case fell within the second category of RICO enterprises, that is, a "group of persons associated together for a common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. The existence of the enterprise, the Court held, must be shown by some evidence of an "ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Turkette*, 452 U.S. at 583.

The Supreme Court further emphasized that under §1962(c), the "enterprise" and the "pattern of racketeering activity" are not one and the same thing. The enterprise is a separate element under §1962(c) and its existence must be

distinct and separate from the alleged racketeering activity. *Id.* at 583.

The Supreme Court set forth the elements necessary to establish an "enterprise" under §1962(c): (1) an ongoing organization whose members function as a continuing unit, and (2) an existence separate and distinct from that inherent in the conduct of racketeering activity. These principles have been consistently followed by the Third Circuit and by other Courts of Appeals.

Since *Turkette* was handed down, the Third Circuit has twice decided cases where the issue of whether the facts were sufficient to show the existence of an "association in fact" RICO enterprise. In *United States v. Riccobene*, 709 F.2d 214, 222 (3d Cir. 1983) *cert. denied* 464 U.S. 849 (1983), the issue was whether an enterprise was formed by the association of various members of a "crime family". The Third Circuit employed the elements set forth in *Turkette* to determine whether the facts in that case were sufficient to sustain a finding that an enterprise existed. Adopting a variation of the *Turkette* test for an "association in fact" enterprise, the Court concluded that the association must have: (a) some guiding mechanism for controlling and directing the affairs of the association; (b) the existence of a continuing unit with associates fulfilling roles consistent with the organizational structure; and (c) an existence beyond what is necessary to engage in racketeering activity. *Riccobene*, 709 F.2d at 222-223.

In *Riccobene*, the Third Circuit found sufficient facts to satisfy all of these elements. The association was a hierarchy presided over by the head of the alleged "crime family"; each member of the "crime family" occupied continuing positions within the group; and the enterprise served as a "clearinghouse" beyond what was necessary to accomplish any single act of racketeering activity charged against the individual defendants. *Id.* at 223-224.

In *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162 (3d Cir. 1989), the Third Circuit did not refer directly to the holding of *Turkette*, but followed the Supreme Court's direction and

looked to the statutory definition of an enterprise to determine whether sufficient facts were pleaded to show that a group of companies functioned as a continuous triparte unit. *Id.* at 1166.

The Third Circuit's application of the principles set forth in *Turkette* is consistent with the manner in which other Courts of Appeals have applied the "enterprise" elements, enumerated in *Turkette*, to the particular facts. In *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982) *cert. denied* 459 U.S. 1040 (1982) the Eighth Circuit found that facts showing loose patterns of associations among the members, short-lived arrangements, nonparticipation in the planning and organization of the association by various members, and the lack of an overall structure or control over the association demonstrated the absence of an ongoing, structured association that formed an enterprise under RICO.

In *Atlas Pile Driving Co. v. Di Con Financial Co.*, 886 F.2d 986, 995 (8th Cir. 1989), the Eighth Circuit again applied the facts of the case to the principles set forth in *Turkette* but this time found that an association of five interrelated companies that had a distinct structure and an organizational system beyond what was necessary to perpetrate the predicate acts of racketeering activity did form an "enterprise" under the statute. *Id.* at 996.

The Fifth Circuit has engaged in a similar analysis. In *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir. 1987) *cert. denied* 483 U.S. 1032 (1987), the Court rejected the claim that a bank, its holding company, and three bank employees was an association in fact enterprise, finding no facts to demonstrate that the "enterprise" (comprised of the bank and the holding company) was separate and apart from the alleged racketeering activity of the bank. In addition, there were no facts showing that the bank, the bank holding company and the bank's employees functioned as a continuing unit. The fact that the holding company purchased the plaintiffs' notes from the bank was insufficient to establish the holding company's association with the bank. *Atkinson*, 808 F.2d at 441. In *Montesano v. Seafirst Commercial Corp.*, 818

F.2d 423 (5th Cir. 1987), the Fifth Circuit found that two individuals who joined together to commit one discrete criminal act did not create the type of ongoing association described by the Supreme Court in *Turkette*. *Montesano*, 818 F.2d at 427.

In this case, the Third Circuit's holding that Fidelity cannot be named as both a defendant and an enterprise is entirely consistent both with its prior holdings and with the post-*Turkette* cases handed down in other circuits. Implicit in the Court's holding is that the amended complaint does not allege an "association in fact" enterprise; facts sufficient to demonstrate the existence of an ongoing organization, that is something separate and distinct from the alleged racketeering activity of Fidelity, are absent. In fact, the allegation that the Parent Company and First Fidelity Bancorporation, two members of the alleged "enterprise", did not merge until February, 1988 — in the middle of the alleged Kehr Packages Scheme — negates the existence of an ongoing organization. There is no allegation in the amended complaint that the Parent Company and First Fidelity Bancorporation were associated in any way prior to the merger.

Petitioners' allegation that the Parent Company audited the loans of its subsidiaries, i.e. Fidelity, and that the reports generated by those audits were used by the Respondents to implement the Kehr Packages Scheme further demonstrates the absence of an enterprise. The allegation retracts any inference that the enterprise is separate and distinct from the alleged racketeering activity.

The Third Circuit's dismissal of Fidelity as a RICO defendant is not in conflict with any holding of other Courts of Appeals and is entirely consistent with the holding of *United States v. Turkette, supra*. Accordingly, Petitioners' request for a writ of certiorari on this issue should be denied.[4]

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4. The Court of Appeals, having found no claim under §1962(c), did not consider Petitioners' §1962(d) conspiracy claim and petitioners do not address this issue in their petition. Notwithstanding this, the proposed amended

(footnote continued on next page)

3. The Third Circuit's application of the RICO pattern requirement is consistent with this Court's holding in *H.J. Inc. v. Northwestern Bell Telephone Co.*

Mail fraud is the basis of Petitioners' §1962(c) claims, but the crux of the claims rests upon the allegation that Respondents engaged in a scheme to defraud Petitioners by making false promises that additional financing would be made available to Kehr Packages. (*See* A54, 55). The racketeering activity of the Loan Officers started at the closing of the loan in December, 1987, when they allegedly made the commitment that Kehr Packages would receive the additional financing. It continued for the next seven months until the Loan Officers left Fidelity. During this time and for sometime thereafter, loan invoices and notices of default were sent by Fidelity to Kehr Packages. (A54, 56).

Donnelly is alleged to have engaged in four separate criminal acts after the Loan Officers left Fidelity. First, he told Petitioners that he would review the loan file and asked Petitioner James McMurtrie for a "plan of attack" as part of a scheme to mislead Petitioners to believe that he would "attempt to secure" working capital for Kehr Packages. Second, he obtained a "knock down" appraisal of the assets of Kehr Packages. Third, he failed to disclose to Petitioners that he worked in the asset recovery department of Fidelity. Finally, he delayed in approving the transfer of the stock of Kehr Packages to a potential buyer. (A54, 55).

The Third Circuit found that Donnelly's acts did not fall under the purview of the mail fraud statute. Thus, the Court concluded that only the acts of the Loan Officers were critical to its analysis of the alleged "pattern of racketeering activity" under the principles enumerated by this Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). (A27).

(footnote continued from preceding page)
complaint fails to state a §1962(d) conspiracy claim in that it does not contain any allegations that Respondents agreed to either join the conspiracy or commit the predicate acts. *See United States v. Adams*, 759 F.2d 1099 (3d Cir. 1985) *cert. denied* 474 U.S. 971.

Petitioners contend that the Third Circuit's approach to the pattern inquiry obliterates the concept of "closed-end" continuity as explained by this Supreme Court in *H.J. Inc.* According to the Petitioners, if Donnelly's conduct was bootstrapped to that of the Loan Officers, the alleged predicate acts would have occurred over a nineteen month period rather than the eight month period over which the conduct of only the Loan Officers occurred, continuity would have been satisfied, and a "pattern of racketeering activity" would have been established. In addition, Petitioners argue that continuity should be measured solely by the time period over which the mailings occurred, not the underlying fraudulent acts of the Respondents.

Petitioners overly simplistic durational threshold concept is flawed for two reasons. First, it considers the mailings in isolation regardless of whether criminal activity occurred over that period of time. Second, it bootstraps the innocent conduct of Donnelly to the alleged acts of the Loan Officers in order to satisfy the "pattern" requirement of RICO. This position is not supported by the holding of *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

In *H.J. Inc.*, this Court squarely addressed the standards governing the pattern requirement. Rejecting the proposition that a pattern is established by proving two predicate acts, the Supreme Court stated: "[T]he mere fact that there are a number of predicates is no guarantee that they fall into any arrangement or order." *H.J. Inc.*, 492 U.S. at 238. Looking to the legislative history of RICO for guidance, the Supreme Court held that in order to satisfy the "pattern" requirement of the statute, a RICO plaintiff had to show "that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." *Id.* at 239.

The concept of relatedness was defined by the Supreme Court as criminal acts that "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (citation omitted). The

requirement of "continuity" was troublesome, but was explained as being both a closed-end and open-ended concept. *Id.* at 241.

Closed-end continuity refers to repetitious conduct that extends over a substantial period of time. *Id.* at 241. Open-ended continuity is conduct that is not repetitive, but by its very nature poses a threat of long term criminal activity. *Id.* at 241. Predicate acts in furtherance of a single scheme can constitute a pattern, but only if the acts present a threat of future criminal activity. Predicate acts that span only a few weeks or months and do not threaten future criminal activity do not satisfy the "pattern" requirement. *Id.* at 242.

This Court declined to formulate a test for continuity in the abstract or to fix a period of time over which criminal activity must occur in order to satisfy the element of continuity under its closed-end concept. That task was left to the courts to be decided on a case-by-case basis.

In an earlier decision, the Third Circuit noted that "virtually every garden-variety of fraud is accomplished through a series of wire or mail fraud acts that are 'related' by purpose and spread over a period of at least several months." *Marshall-Silver Construction Co. v. M. Mark Mendel,* 894 F.2d 593 (3d Cir. 1990). Thus, the relatedness test described in *H.J. Inc.* is virtually always satisfied in cases where acts of mail fraud are alleged. But the continuity test is more difficult to apply, especially in cases such as this one where the underlying fraudulent acts do not themselves constitute racketeering activity.

In this case, the alleged criminal activities related to the Kehr Packages Scheme. The mailing of bank statements and notices of default were only happenstance to the scheme. Thus, the critical question before the Court was whether the underlying fraudulent acts, and not the mailings, amounted to or posed a threat of continued criminal activity under the guidelines enumerated by this Court in *H.J. Inc.*

The Third Circuit noted that the Supreme Court did not address this issue in *H.J. Inc.* However, after *H.J. Inc.* was handed down, the Seventh Circuit reviewed for the third time

the issue of whether the existence of multiple predicate acts of mail and wire fraud demonstrated the requisite continuity. In *United States Textiles, Inc. v. Anheuser-Busch Companies*, 911 F.2d 1261 (7th Cir. 1990), the Seventh Circuit reiterated its prior position that "the multiplicity of mailings does not necessarily translate into a 'pattern' of racketeering activity," particularly where the mailings are only incidental to the underlying alleged wrongdoing. *U.S. Textiles*, 911 F.2d at 1268.

In *U.S. Textiles*, since the predicate acts of mail and wire fraud related to the underlying crime of extortion, the focus was on the underlying wrongful acts for purposes of satisfying the continuity test. Similarly, in this case, because the Kehr Packages Scheme was allegedly carried out by the underlying fraudulent acts of the Loan Officers and Donnelly, and not the mailings, the relevant acts for purposes of establishing continuity had to have been the alleged deceptive activities of the Loan Officers and Donnelly.

Petitioners cite no authority to support their position that the test for continuity depends solely on the duration of the mailings in this case. The reason is clear — this Court declined the invitation to develop rigid rules concerning RICO's pattern requirement, preferring the courts to examine the specific facts of each case to determine whether the predicate acts relied upon establish a "pattern of racketeering activity." *H.J. Inc.*, 492 U.S. at 242. It is unlikely that this Court in *H.J. Inc.* would have so wholeheartedly reached this conclusion if closed-end continuity depended solely on the duration of the combined number of mailings as Petitioners contend.

Petitioners also present the novel theory that Donnelly's conduct should have been considered in conjunction with the conduct of the Loan Officers for purposes of evaluating the "pattern" requirement of RICO. The Third Circuit found that Donnelly's conduct did not amount to criminal activity under the purview of the mail fraud statute since the alleged acts could not be "reasonably calculated to deceive a person of ordinary prudence and comprehension." (A21, 22) (citations omitted). It declined to bootstrap the allegations against

Donnelly to the alleged deceptive acts of the Loan Officers for purposes of establishing continuity. To do so would eradicate the intent of RICO to "reach activities that amount to or threaten long-term criminal activity," *H.J. Inc.*, 492 U.S. at 243, n. 4, and subject otherwise innocent persons to liability under RICO who merely by circumstance become entwined in a fraudulent scheme. Certainly Congress did not intend RICO to apply in this manner.

In addition, Petitioners claim that the allegations of their amended complaint meet the requirement of "open-ended" continuity as described by this Court in *H.J. Inc.* They request, however, clarification of the concept of "open-ended" continuity because, in their view, the guidelines set forth by this Court in *H.J. Inc.* are "inadequate to foster a meaningful concept of pattern" in the context of open-ended continuity. (Petitioners brief, p.15).

Petitioners are asking this Court to do what it expressly refused to do in *H.J. Inc.*, that is, to provide a rigid test to determine whether the alleged predicate acts pose a threat of continued criminal activity. In *H.J. Inc.*, this Court made it clear that the specific facts of each case are to be reviewed to determine this issue. *Id.* at 242. But the Court offered some factual examples of how the continuity element might be satisfied. The threat of continuity can be established where "the predicates [are] attributed to a defendant operating as a part of a long-term association that exists for criminal purposes." *Id.* at 242. In other cases, the Court stated, it can be established "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business." *Id.*

Utilizing these guidelines in this case, the Third Circuit held that the amended complaint showed that the alleged misrepresentations of the Loan Officers, which largely occurred at the closing of the loan to Kehr Packages, were not made to anyone other than Petitioners James and Charles McMurtrie, nor were any other misrepresentations made, and there was no threat that the Loan Officers would have continued to make

false promises after they left their employment with Fidelity. (A28). There were no facts from which it could be even remotely implied that fraud was their "regular way of doing business." (A24).

In *H.J. Inc.*, the Supreme Court emphasized that the concepts of relatedness and continuity, and the methods of proof thereof, cannot be fixed with any degree of certainty. The courts are therefore left with the task of evaluating each case to determine whether the alleged criminal activity meets the pattern requirement of the statute.

The Petitioners here present the question of whether the criminal acts of the Respondents constitute a "pattern of racketeering activity" under RICO. This issue was resolved by the Third Circuit through the use of the principles and guidelines set forth by the Supreme Court. This Court's review of this question resolves no conflict among the courts and would be of no significance or offer further guidance into the scope of RICO.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,

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